

## SB 184 - VOTE NO TO AN INSURER WINDFALL

EXHIBIT NO. 5DATE 2-7-13

SB 184 reduces the amount that a medical malpractice insurer has to pay for a claim, simply because the patient harmed by malpractice dies, rather than lives. SB 184 simply means insurers get to keep more money. **SB 184**

**The law did not change in 2002** - the 2002 case (*Payne*) simply said that 1987 changes to the law did not change the century old substantive law of Montana that **deduction of consumption expenses are not allowed in survival actions - the same holding as a majority of the other states.**

The *Payne* Court said the 1987 changes simply made clear that wrongful death and survival actions **"must be combined in one legal action, and any element of damages may be recovered only once."** 27-1-501

Without facts, there is no compelling state interest to justify denying medical malpractice victims the same rights as all other tort victims.

**Malpractice Insurers Already Get Special Treatment** They already have a damage cap of \$250,000, a special pre-court review panel, a special expert witness rule, a special statute of limitations, and special evidence rules. The Montana Medical Association lists some 45 special pieces of malpractice legislation, and terms those as "qualitatively 'better' than measures in almost all states." **SB 184 is another special damage cap.** Malpractice is not a "bad outcome" or a "mistake" - it is the failure to meet the standard of care for the profession.

**Survival actions are different than wrongful death actions** (see back).

**Is it "fair" that the wrongdoer's insurance company pays less, simply because the victim dies, rather than lives?**

**SB 184 - Saving Insurers Money** Here's a simple example to show how the "fairness" of SB 184 would work. Compare the amount of money the malpractice insurer would have to pay if the patient/victim is permanently disabled, to the amount to be paid if he dies.  
*Patient, 40 years old, married, making \$45,000/year, 25 years work life left - no inflation or wage increase factored in. Spending per year on consumption for "basic necessities and personal expenditures" - house, food, utilities, cars, fuel, insurance, medical, etc.- figured at 25%, 50% or 75% of total income.*

	Lost Future Wages	Deduct Consumption	Cost to Insurer
Permanently Disabled	\$1,125,000	\$0 (no consumption deduction)	\$1,125,000
Dead			
Consumption 25%	\$1,125,000	\$281,250	\$843,750
	<b>SB 184 Savings To Insurer</b>		<b>\$281,250</b>
Consumption 50%	\$1,125,000	\$562,500	\$562,500
	<b>SB 184 Savings To Insurer</b>		<b>\$562,500</b>
Consumption 75%	\$1,125,000	\$843,750	\$281,250
	<b>SB 184 Savings To Insurer</b>		<b>\$843,750</b>

**Is it "fair" that it costs the wrongdoer's insurance company less, simply because the victim dies?**



When a person's life is taken because of the wrongful act of another, there are two civil legal actions- a **wrongful death** action and a **survival** action.

**Wrongful death** actions belong to the persons still living who have been injured by the death - usually spouses, parents and/or children. Damages include: loss of consortium; loss of comfort and society; and the reasonable value of the contributions in money that the decedent would reasonably have provided for support, education, training, and care. **One MEASURE of support is lost future earnings.** It is not simply that: (1) family members prove how much the deceased would have made, (2) the defense gets to deduct consumption expenses, and (3) the family gets the rest. The reality is that family members have to prove how much their dead family member would have contributed to them, taking into account how much the decedent would have consumed for his living expenses - necessities and personal spending. And then, the defense gets to argue that, had the person lived, they would have consumed more of those earnings, and therefore could not have contributed as much to the family members as they are asking for.

**The survival action** belongs to the decedent's estate and allows recovery for the injury to the deceased from the action causing death. The damages recoverable in the action are personal to the decedent and the estate's right of recovery is identical to the decedent's had he or she lived. In a survival action "the measure of damages is not lost support but rather lost earnings during the period the plaintiff would have lived if not for the injury. **Speculating as to how the injured party may have spent those future earnings if not for defendant's tortious conduct is a very different exercise than permitting a wrongful death plaintiff to prove damages for lost support by accounting for his or her supporter's other expenses.**" *Payne* (emphasis added).

The legal principle that a person's right to assert legal actions and defenses **survives** after his death **has been the law in Montana since the late 1800's.** It is a simple recognition that the wrongdoer should not be able to benefit economically, just because the victim dies. **Survival actions** are personal to the victim - the damage the victim suffered and what was taken away by the wrongful act, including lost future earnings.

The law did not change with the 2002 case (*Payne*), the Court only reiterated that Montana has followed, and continues to follow, the **majority view in the country "that economic consumption should not factor into a loss of future earnings computation in survival actions."**

While none of us has 100% of our earnings available to our estate when we die, we do get to choose how much of our earnings we spend, what we spend them on, who we spend them with - **choices that are taken away from a malpractice victim when her life is cut short by medical malpractice.**

**It's time to decrease the occurrence of malpractice, instead of once again decreasing the amount of damages victims receive - victims who have proven malpractice has occurred and the damages that resulted. Vote NO to SB 184.**